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Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law

Chad Flanders

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I. INTRODUCTION: WHY AREN'T DELIBERATIVE DEMOCRATS AND ELECTION LAWYERS TALKING?

In recent years, political philosophy has been largely dominated by theories of deliberative democracy, such as those offered by Jurgen Habermas in his monumental *Between Facts and Norms*[1] and Amy Gutmann and Dennis Thompson in their lucid *Democracy and Disagreement*.[2] The key concept for deliberative democrats is conversation: the exercise of political power, according to deliberative democrats, is only legitimate when it is justified by conversation and (ideally) agreement with other citizens, based on reasons that they can all understand.[3] In developing this ideal of conversation, deliberative democrats have pointedly opposed theories of democracy that see the exercise of power (perhaps cynically) as simply a matter of bargaining and balancing interests, rather than a rule of deliberative reason.[4] However, this has made it imperative that deliberative democrats show how their theories work in practice. Otherwise, they risk opening themselves up to the charge that, although their theories may sound nice, in practice politics really is just about power and interests. If the interest theory of democracy aimed low, at least it gave a plausible description of how democratic politics worked and could work. As a result of challenges to its practicality, deliberative democratic theory, in the words of one prominent deliberative

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[1] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992).

[2] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996). *See also* DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999). Other important collections on deliberative democracy are DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); and DEBATING DELIBERATIVE DEMOCRACY (James S. Fishkin & Peter Laslett eds., 2003).

[3] Versions of this idea can be found in JOHN RAWLS, POLITICAL LIBERALISM (1993) and Joshua Cohen & Charles Sable, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).

[4] For classics in this area, see THEODORE LOWI, THE END OF LIBERALISM (1969); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942); and more recently RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

democrat, "has moved beyond the 'theoretical statement' stage and into the 'working theory' stage."[5]

Around the same time as the rise of deliberative democracy in political theory, the study of law witnessed an increasing interest in the practice of elections. Although *Bush v. Gore*[6] in some ways now represents the key moment in the rise of election law as "its own field of study,"[7] legal theorists had already remarked on the gradual "constitutionalization of democratic politics."[8] According to a path-breaking *Harvard Law Review* Foreword by Richard Pildes, the Supreme Court has been making decisions about elections that assume, even if they do not explicitly articulate, a theory about democratic structure: how elections should be run, who should be able to vote, etc.[9] In many cases over the past few years, Pildes says, the Supreme Court has been slowly developing a theory of democracy that emphasizes order and stability over robust competition.[10] And as further evidence of the Supreme Court's lurch into political theories of democracy, Justice Sandra Day O'Connor needed to rely on the work of Hannah Pitkin in order to distinguish between two types of representation in an opinion involving the representation of African-Americans in Georgia.[11] The Court's recent and increasing intervention into the law of elections shows, according to election scholars, that the Court is slowly involved in hammering out a "law of democracy."[12]

Given the evident and even patent relationship of these two fields—political theory and election law—and the trend of one (political theory) towards the more practical and the trend of the other (election law) towards theory, one would expect there to be a burgeoning and fruitful exchange between the two disciplines. Deliberate democrats would need to be aware

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[5] Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 307 (2003).

[6] Bush v. Gore, 531 U.S. 98, 109 (2000).

[7] Questions about legitimacy of election law as an important area of study were largely pre-*Bush v. Gore*. *See generally* Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY (2002).

[8] Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

[9] *Id*. *See also* Richard Pildes, *Constitutionalizing Democratic Politics*, *in* A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY 155 (Ronald Dworkin ed., 2002) (noting the implicit theoretical ambitions of the Supreme Court in election law, with special reference to *Bush v. Gore*).

[10] Richard H. Pildes, *Democracy and Disorder*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 140 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

[11] Georgia v. Ashcroft, 539 U.S. 461, 481, 483 (2003) (citing HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967)).

[12] For the foundational casebook in the area, s*ee* ISSACHAROFF ET AL., *supra* note 7.

of the constraints on democratic decisionmaking imposed by Supreme Court decisions (and election law more generally) in order to make sure their proposals are feasible and sensitive to real-world conditions. And election law theorists would need to have a grounding in political theory in order to make theoretical sense of the Supreme Court's jurisprudence, and to offer intelligent critiques of it. In short, one would have expected a convergence on what Dennis Thompson has recently called "midrange principles," that is, neither broad principles (on the level of deliberative democracy) nor simply case-by-case analysis (as in election law) but reflection on "principles of electoral justice and . . . their relation to electoral institutions."[13]

Unfortunately, very little of this has taken place. Even in the book quoted above, Dennis Thompson does little to connect his larger theory of deliberative democracy to his proposed institutional changes, and his book reads more like a primer on election law for philosophers.[14] Although Thompson does a good job of identifying the divide in the current literature between theory and practice, his book does not succeed in bridging that divide.

My essay tries to show the ways in which deliberative democrats and election law theorists need each other. I do so by examining in detail one proposed reform of American democracy along deliberative lines, offered by Bruce Ackerman and James Fishkin in their book *Deliberation Day*.[15] The focus here is partial but not, I think, unwarranted. Ackerman and Fishkin's book represents a bold and rigorously formulated effort to make voting more reflective and citizens more engaged in voting. However, in the course of their proposals, Ackerman and Fishkin miss how key elements of the structure of American election law threaten to make "Deliberation Day" into less of an arena for wide-ranging democratic deliberation than it could be and to introduce deliberation into areas where we might prefer that it not be.

In one respect, my criticism of Ackerman and Fishkin is similar to a criticism made about democratic theory in the abstract: it is said that deliberative democracy, although it purports to be inclusive, actually

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[13] DENNIS F. THOMPSON, JUST ELECTIONS viii, ix (2002).

[14] *Id.*

[15] BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY (2004) [hereinafter Ackerman & Fiskin, DELIBERATION DAY]. Earlier work by the two authors laid the groundwork for their collaboration. *See* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter Ackerman, SOCIAL JUSTICE]; 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION (1991).

excludes some viewpoints, and artificially restricts dialogue.[16] For example, Bruce Ackerman's earlier book, which emphasized dialogue as a way of justifying political principles,[17] was criticized for artificially excluding "some certain conceptions of the good life" by "privatiz[ing] them and push[ing] them out of . . . public debate in the liberal state."[18] I do not claim that Ackerman and Fishkin's proposal purposefully excludes some voices, only that by relying on certain features of American electoral structure, they miss the ways in which deliberation might be biased, unproductive, or incomplete. The point is, no deliberation takes place in a vacuum, and it pays to be aware of the structures that will inevitably dictate the direction and even sometimes the outcomes of deliberation. In the case of deliberative democracy, that structure, at least in the American context, is provided by election law, and (at the limit) the Constitution.

In what follows, I look at three areas of election law that Ackerman and Fishkin fail to appreciate. These areas are: the law regarding political parties, political gerrymanders, and racial districting. In the first two areas, the dilemma is that protection for existing political parties could skew deliberation towards the extremes of left and right, and work to exclude voices that might diverge from the lines of the two major parties. Interestingly, Ackerman and Fishkin not only do not challenge the two-party system, they embrace it, using the major political parties as key functionaries in the management of Deliberation Day. In the third area (racial districting), the problem is more subtle. It involves the question of whether deliberation of the kind favored in *Deliberation Day* is in tension with deliberation at the level of Congress. Sometimes, in the pursuit of better deliberation at a different level, we might prefer that there be *less* citizen-level deliberation rather than more. For example, we might want to guarantee some "safe" minority congressional seats, which may contribute to better deliberation at the congressional level because of the presence of more diverse voices.

Ackerman and Fishkin's relative neglect of these important areas of election law points to a larger theme of this paper, which is that sometimes there will be inevitable trade-offs between the kinds of deliberation we want. Do we want better deliberation at the citizen level, or at the representative level? We may have to choose. We also might have to choose between deep debate between two parties, and a more wide-ranging

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[16] *See, e.g.*, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

[17] Ackerman, SOCIAL JUSTICE, *supra* note 15.

[18] SEYLA BENHABIB, SITUATING THE SELF 97 (1992). *See generally* MONIQUE DEVEAUX, CULTURAL PLURALISM AND DILEMMAS OF JUSTICE (2000).

debate among multiple parties in a presidential election. And again, there may be a choice we have to make between inadequate deliberation now and better deliberation later. Should we choose in favor of immediate yet inadequate deliberation, or do we wait for more structural reforms to be made? I argue that there are trade-offs that election law forces us to make and that it pays to be aware of those trade-offs. Ackerman and Fishkin implicitly make certain choices in their proposal for one electoral regime over the other without justifying their choices.[19] But greater attention to the current structure of American election law can make us aware of the costs and benefits of choosing one deliberative regime over another. It can also show us that in each of these three cases, the implicit choices of Ackerman and Fishkin will result in *worse* deliberation rather than better deliberation.

Finally, my paper tries to show that attention to the structure of American election law teaches us that sometimes the best means to get to the ideal of deliberation is not more deliberation. Ackerman and Fishkin work from the bottom up.[20] They believe that if citizens are more deliberative, then the President and Congress and politics more generally will be more deliberative—that "[i]f Deliberation Day succeed[s], everything else would change."[21] Better deliberation among citizens would have effects across the entire political structure, from the quality of candidates to the influence of money, and even to the structure of political parties.[22] My suggestion is that top-down reforms are also necessary, and in some cases need to take priority over deliberative ends if we want to achieve some of the goals Ackerman and Fishkin (and I) hope to reach.

II. PARTIES

I propose to consider the relationship between theories of deliberative democracy by looking closely at one particular proposal: the idea for Deliberation Day defended and articulated by Bruce Ackerman and James Fishkin. Why this one? Certainly there are other proposals, such as Ethan Leib's suggestion of a fourth branch of government.[23] Two reasons counsel in favor of choosing Ackerman and Fishkin (apart from the fact that it seems to be the proposal most fully developed and imagined). First,

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[19] See detailed discussion *infra* Part II.

[20] This is especially evident in the first few pages of their book. *See* Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 3.

[21] *Id.*

[22] *Id.*

[23] ETHAN LEIB, DELIBERATIVE DEMOCRACY IN AMERICA (2004).

Ackerman and Fishkin's proposal is bold and comprehensive, affecting at the limit both presidential and congressional elections. Its sweep and its radicalness allow us to see the potential defects of institutionalizing deliberative democracy in especially bright relief: the problems with deliberative democracy and election law will show up here, whereas they might not be as obvious in smaller scale, incremental reforms. At the same time, Ackerman and Fishkin's Deliberation Day experiment seems realistic—they themselves characterize it as an exercise in "realistic utopianism."[24] Not only do they take seriously questions of cost and implementation, but they have also done deliberation experiments, on a large scale by Fishkin's deliberative polling,[25] and on a smaller scale in communities in Colorado and Connecticut. If I am right about some of my criticisms of the larger-scale program, this will give us reason to look more carefully at the smaller, more incremental instantiations of Deliberation Day. It is hard to imagine small steps to a fourth branch of government.[26] Both because of its boldness and its potential for immediate realizability, Ackerman and Fishkin's proposal seems the best one to analyze. Its boldness will make its errors (should there be any) easier to spot, and its immediate realizability makes it the one that we should give closest scrutiny because, on a smaller scale, it is already being used.[27]

What, then, is the proposal? Ackerman and Fishkin propose that we set aside a national holiday, before elections (first for presidential elections, and then later on, for congressional elections as well), for citizens to debate the issues of the campaign.[28] The process of preparing for Deliberation Day begins one month before the actual date, by asking the candidates to identify one or two "important issues" confronting the nation.[29] "Within a two-party framework," Ackerman and Fishkin write, "this query will generate two to four themes that will structure the conversational run-up to Deliberation Day," which is held about two weeks before elections.[30] On Deliberation Day itself, the two (in this case, presidential) candidates will debate, and citizens will gather in groups throughout the nation to watch

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[24] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 13-14.

[25] FISHKIN, *supra* note 15.

[26] To be fair, there have been smaller "citizen" panels that Leib relies on for examples of his proposal on a smaller scale. But it still seems a large leap to an entirely new branch of government. On Ackerman and Fishkin's proposal, we can see more realistically how small examples of deliberation might grow into a full-scale Deliberation Day.

[27] A compressed version of their proposal can be found in Bruce Ackerman & James Fishkin, *Deliberation Day*, 10 J. POL. PHIL. 129 (2002).

[28] DELIBERATION DAY, *supra* note 15, at 17.

[29] *Id.* at 24.

[30] *Id.*

the debate. After the debate is finished, the groups that have met to watch the debate will break up into still smaller groups (of fifteen or so). The (smaller) groups of fifteen will debate among themselves for forty-five minutes and choose questions to ask the representatives of the campaigns in their larger group "citizen assembly." In the citizen assembly itself, a moderator will ask "local party representatives"[31] questions selected from the list of questions prepared by the smaller groups. After lunch, the citizens again meet with their small groups and make a list of supplemental questions, which are then asked of party representatives at a second citizen assembly.[32] The citizens meet in small groups a last time, and Deliberation Day is over.[33] Two weeks later, they vote in the presidential election.

Ackerman and Fishkin acknowledge the demands such an arrangement would place on party organization. As is clear from the description of Deliberation Day, much depends on the citizen assembly—where local party officials answer questions from the gathered small groups. Indeed, Ackerman and Fishkin tout the revitalization of local party organization as one of the benefits of Deliberation Day. "For the first time in a long time," they write, "it will no longer make sense for presidential campaigns to operate independently of local party organizations."[34] "How else," they continue, "will they be able to find tens of thousands of respected local leaders to represent the national candidate at the citizen assemblies?"[35] But such a demand for personnel will only be able to be met by the well-established political parties, i.e., Republicans and Democrats. It would be impossible for third parties—even third parties with some national following—to be able to compete with the major parties in providing people to represent them on Deliberation Day. The lack of a representative will be obvious: the two parties will have their representatives, fielding and answering questions, while the third-party candidate will have no one to defend him or her (even if the candidate does well in the debate), simply because they lack the organizational resources to have a representative at every Deliberation Day event. Ackerman and Fishkin mention, in a footnote, that should a third-party candidate be "winning the support of 15 percent or more of the votes in leading opinion polls" then he or she would be eligible for Deliberation Day (twenty percent for congressional races).[36]

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[31] *Id*. at 30.
[32] *Id*. *at* 34.
[33] *Id.*
[34] *Id*. at 32.
[35] *Id*.
[36] *Id*. at 105, 236 n.11. It is ironic that Ackerman and Fishkin rely on polls here.

But this restriction seems almost an afterthought, insensitive to the organizational demands Deliberation Day would put on any but the two major parties. Even were a third-party candidate able to poll well in the run up to Election Day, this still would not make up for the lack of organizational and managerial support.

Why do the difficulties that third parties might face in Deliberation Day matter? They matter because they affect the quality and the diversity of deliberation on Deliberation Day by further entrenching the publicity advantage of the two major parties. If no one shows up to represent the third-party candidate at Deliberation Day (supposing that the third-party candidate wins the required fifteen percent in public opinion polls), it will not only make the third party look bad (because no one will be there to defend the candidate's position on issues or to articulate them further in response to questions) but the citizens in the citizen assembly will miss out on the opinions and the facts that the third-party candidate representative could bring to the table. Debate will be poorer because it will not represent the full range of opinion. Although the questions asked to representatives of the two major parties might be influenced by the presence of the third-party candidate in the televised debate (again, if that candidate had 15 percent support in the polls), the fact that the major party representatives would be the *only* ones there to debate and answer the questions will affect how that question is treated. Imagine how the moderator will have to announce to the citizen assembly, "Regrettably, there is no one here to defend the (Green, Conservative, etc.) party, so you will only be able to ask questions of the Democrat and Republican representatives." Alexander Meiklejohn famously stated the ideal of democratic debate was a debate in which everything that was worth saying was said.[37] In the world of Ackerman and Fishkin's Deliberation Day, only that which has sufficient institutional support gets said.

The point here is a structural one: the structure of Deliberation Day focuses debate in a certain way, maintains the two-party system, and prevents serious challenges to it. Deliberation Day does not merely presuppose the two-party system but it entrenches that system by giving the two major parties significant advantages: first, by restricting the televised debate to only those candidates who can get fifteen percent approval in the polls[38] and second, by erecting a practical barrier against

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[37] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (Oxford Univ. Press 1965) (1948).

[38] The problem of limiting televised debates to only candidates who had a certain amount of support in the polls was explored in *Arkansas Educational Television Commission v. Forbes*, 523 U.S.

representation in the citizen assemblies. In doing this, Ackerman and Fishkin, with or without realizing it, are siding with the Supreme Court's decisions in this area, which have in many ways helped foster the continued entrenchment of the major parties. In Richard Pildes' telling, the bias in the Supreme Court's election law jurisprudence has been towards protecting major parties, and their distinctiveness.[39] This two-party entrenchment has been visible in many ways, from the Court preventing parties from opening their primaries to independent voters, to keeping third parties off the ballot and making it harder for them to participate in televised debates.[40] From the Supreme Court's perspective, according to Pildes and others, the goal is for stable elections, in the sense of avoiding the potential "disorder" and "confusion" of multiparty and multi-candidate elections.[41] These decisions show the way that, in Pildes' words, "constitutional law now limits the structural changes through which disaffection with the current practices of democratic politics can be given institutional expression."[42] The current system already entrenches the two parties directly, by allowing them to set the conditions that make it harder for third parties to compete in politics.[43] It also benefits the two parties indirectly, by giving incumbents advantages in their races and allowing

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666 (1998), with the Court giving great leeway to a public television station to choose whom it wanted to invite to the debates.

[39] Pildes, *supra* note 10.

[40] *See* Clingman v. Beaver, 544 U.S. 581, 593-94 (2005) (upholding Oklahoma's semiclosed primary law, and claiming that states have an interest in preserving the identity of the major parties); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (allowing limits on third-party access to televised debates); Timmons v. Twin Cities Area New Party¸ 520 U.S. 351, 353-54, 367 (1997) (upholding restrictions on "fusion" candidates, and noting that states can enact election regulations that "in practice, favor the traditional two-party system"); Munro v. Socialist Workers Party, 479 U.S. 189, 194-96 (1986) (upholding primary qualification requirements for third party candidates to appear on the general election ballot); Storer v. Brown, 415 U.S. 724, 729-30, 736 (1974) (upholding restrictions on independent candidates for office, and affirming that states can take measures to prevent "unrestrained factionalism"); Pildes, *supra* note 9, at 168-72. *See also* Burdick v. Takushi, 504 U.S. 428, 438-39 (1992) (upholding Hawaii's ban on write-in candidates in its general election, in the interest of preventing factionalism). *See generally* Jessica C. Furst, Case Comment, *Election Law: "Three's a Crowd": Supreme Court Protection for the Two-Party System*, 58 FLA. L. REV. 921 (2006); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331; Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 172-73 (1991).

[41] Pildes, *supra* note 10, at 158.

[42] Pildes, *supra* note 9, at 155.

[43] *See also* ISSACHAROFF ET AL., *supra* note 7, at 348 (describing the major political parties as "gatekeepers"). *See generally* Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993) (noting the role that the major parties have in structuring access to government).

Democrats and Republicans to draw districts that divide political power between them.[44]

It is not clear, as I have intimated, that Ackerman and Fishkin would want to embrace this trend. It is even less clear that they should want to embrace it. Again, if the goal is deliberation, this goal might not be furthered by excluding third parties from the debate, and allowing the two parties to have the entire field to themselves. Although such exclusion is not always the case with televised debates, it is almost certainly true in most citizen assemblies, where third parties will not have the infrastructure to support "opinion leaders for their team on Deliberation Day."[45] But the point goes deeper than this: if the structure of Deliberation Day does not work against the entrenchment of the two parties (and the subsequent limiting of debate) then it unwittingly furthers that entrenchment. What Ackerman and Fishkin see as revitalizing local party politics is, viewed from another angle, simply exploiting the disadvantages third parties have in entering the political process.[46] Nor can the Ackerman and Fishkin proposal be seen as dictated by necessity, say, by avoiding too many candidates. Certainly Deliberation Day could bear three or even four presidential candidates, which suggests that the poll number for entry could be set lower (or made by other criteria, for example if the candidates had polled at a certain percentage in the previous presidential election). Further, even if third parties were not invited to the debate, they could participate in other ways, say, by being allowed to put one issue in front of the major party candidates—an area which Ackerman and Fishkin place wholly under the discretion of the two major party candidates. Finally, more citizen assemblies could be televised to reduce the strain of having to supply one party member for each assembly. Again, the point is not that these proposals are obviously correct, but that they can be made. This shows that Ackerman and Fishkin made choices about how to structure deliberation, and that structure works to the detriment of allowing certain voices into the debate, hurting not only the excluded parties, but also the possibility of robust deliberation itself. In doing so, Ackerman and Fishkin violate a condition on successful deliberation that they themselves introduce: the Meiklejohnian idea of "normative completeness"—that for

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[44] *See* Pildes, *supra* note 8, at 59-60 (discussing legislative "self-entrenchment").

[45] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 32.

[46] For a good overview of different theories about the role of parties in a democracy, see Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000).

full and robust debate there must be "confrontation with a series of different views."[47]

Ackerman and Fishkin may be doing the best that they can to deepen deliberation within the two-party system, rather than to find ways in which to accommodate other parties. This is a defensible position, but it needs defending. A proper defense would require an ideal of deliberation that puts a premium on having two political parties debate, rather than having three or four candidates share the stage. It is not obvious that two candidates are better than three or four, especially if the tendency for the two major parties is to move ineluctably towards the center. Deliberation over an increasingly narrow set of differences does not seem to exhaust the possibilities of robust deliberation. Indeed, Ackerman and Fishkin may share this view: they speak (wistfully?) of a Green party candidate making a run in the year 2020.[48] But the point of the preceding argument is that the structure of Deliberation Day gives the major parties an advantage and may even preclude any third-party candidate from gaining momentum. It is no good to hope for a possibility that their very proposal makes harder to obtain.

III. GERRYMANDERED DISTRICTS

In the previous part of this essay, I looked at how Ackerman and Fishkin's proposal arguably limited debate, rather than expanded it, by instituting a deliberative structure that in effect (if not by intention) excluded third parties from deliberation. The focus there was on *what* was the topic of deliberation. Would it be the proposals and ideas of the two major parties, which already enjoy a huge institutional advantage? Or would it be the concerns of third parties, who are often excluded from the ballot in some races? In other words, the question was: who decides what concerns get on the table? My thesis was that by making certain choices, Ackerman and Fishkin did not fight two-party entrenchment, but rather increased it. There is another way that debate can be limited, however: not by restricting what options get on the table (whether it will be the issues of the two major parties or of third parties), but by the selection of who among the *citizens* (rather than the candidates) will participate in the debate. There are many ways that we could approach this issue with relation to Ackerman and Fishkin's proposal. Here we might reference a

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[47] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 182.
[48] *Id.* at 261 n.25.

commonplace (but nonetheless valid) objection to deliberative democracy: the theory that it favors those who are well educated and articulate as opposed to those who lack effective speaking skills and may be less inclined to voice their concerns on Deliberation Day as a result.[49]

We might also note the evident class bias in a sentence such as this one, when Ackerman and Fishkin consider what might be the cost of using schools as spaces for Deliberation Day activity: "The answer is straightforward once you recall that the schools are already closed on Presidents Day while kids join their parents for ski weekends and holiday sales."[50] The possibility that some school-age children and their parents might have jobs and need to work on Presidents Day does not seem to enter Ackerman and Fishkin's ken. Nor, one might suspect, do they take seriously how employees in fields with little autonomy might feel about using their time off to deliberate rather than staying on the job, and possibly earning overtime pay.[51]

There may be ways in which Deliberation Day "selects out" certain people from the class of deliberators. It may do this, even though everyone shows up by giving an implicit preference to those who are more articulate. It also may do this by discouraging some people from showing up in the first place by not effectively countering the (legitimate) incentives some may have to stay away from Deliberation Day. But these are not the problems I want to focus on, although it is clear that they deserve more detailed treatment.[52] Moreover, it is not clear that these kinds of problems affect Deliberation Day uniquely, as opposed to any effort at encouraging deliberation. Further, they do not touch on the present concern of this paper, which is to show how the structure of election law may make a difference to how citizens deliberate on Deliberation Day, as opposed to how social or other facts may influence deliberation. This is a more general concern.

To turn to the concern of this Part: How might the structure of American elections dictate *who* participates in Deliberation Day? In order to get at what I think is a problem in the Ackerman/Fishkin proposal, I first

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[49] Richard Posner makes some of these points in his review of *Deliberation Day*. Richard Posner, *Smooth Sailing*, LEGAL. AFF., Jan.-Feb. 2004, at 41, 42 (book review) ("I sense a power grab by the articulate class whose comparative advantage is—deliberation.").

[50] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 136.

[51] Ackerman and Fishkin mention the issue of adequate child care on Deliberation Day, but offer no real proposal to deal with the (obvious) problem. *Id*. at 123, 129-30. Note also that even though Deliberation Day is a national holiday, there may still be pressures on employees not to take off work.

[52] *See generally* Iris Marion Young, *Activist Challenges to Deliberative Democracy*, *in* DEBATING DELIBERATIVE DEMOCRACY, *supra* note 2, at 102.

need to describe the background to their extension of Deliberation Day past presidential elections, into "Congress Day."[53] For presidential elections, the groupings of citizens in large assemblies can be done based on convenience. Although Ackerman and Fishkin do not give much in the way of detail on this point, we can assume that people will meet at places that are near to them, or accessible via public transportation; they may even join friends at some deliberation forum, even if it is not very close to where they live. It does not matter, at least for presidential elections, that people from various parts of a state (or even from out of the state) meet to debate and discuss the positions of the two major-party presidential candidates. But location becomes relevant when it comes to Congress Day. Since citizens will be voting for *their* Congressperson to represent their locality, they will be meeting and debating only with other people in their state (in the case of Senators) or in their districts (in the case of Congressman). Here, local boundaries matter, and we cannot accept the fluid geographic boundaries that might be the norm in presidential elections. In the end, one can only vote for a representative in one's own district. And geographical boundaries matter in a good way: they matter because they dictate that certain matters of genuinely local concern will be on the agenda, rather than a generic and broad national agenda.

Ackerman and Fishkin propose a Deliberation Day for congressional elections, albeit on a smaller scale than the presidential Deliberation Day. But Ackerman and Fishkin are also aware that there is a problem with congressional races that does not affect the presidential race: in the presidential races, barriers between districts don't matter much: it won't make a difference whether you attend the Deliberation Day meeting in your own district or the neighboring one, or perhaps even one in another state. In the case of congressional races, state and local districts matter, and because of partisan gerrymandering, some districts will involve races that are simply not competitive.[54] Districts will lean heavily towards the Democratic or Republican party, with the result that it may not pay for the other party even to put up a candidate, or to give more than merely token opposition to the candidate who benefits from the gerrymander. Ackerman and Fishkin even go so far as to say that if there is no major-party

[53] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 97-119.

[54] It has wryly been remarked that although people think that we have elections to choose representatives, the reality is that through partisan redistricting, representatives choose the people who will elect them. For an overview of the current election law debate on partisan gerrymanders, see Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004).

challenger in a race, "the celebration should be canceled if polls show that third-party candidates have failed to gain the support of 20 percent of likely voters."[55] Even when they are attentive to a structural problem that can affect the outcome of elections (partisan gerrymanders), Ackerman and Fishkin fail again to give possible third-party candidates any breaks. This treatment ignores how third-party candidates may benefit in a disproportionate way by being part of a Deliberation Day—it may give them the publicity they need to be taken seriously. If a major party fields a candidate, however token, Deliberation Day takes place. If a third-party candidate polls fifteen percent, and is the only opponent against a major party candidate, Deliberation Day is cancelled.[56]

Suppose, however, that there is a race between congressional candidates of the two major parties, in a district that has been gerrymandered along political lines (in other words, where one candidate enjoys a huge advantage because the district has been designed to hold candidates from his or her own party).[57] Now there may be a problem not only with who the citizens are exposed to, both in their small groups and in the citizen assemblies, but also with the composition of the assemblies themselves. A gerrymandered district means that most of the people attending Deliberation Day will be of the same party and more generally of the same ideological disposition. The result is what Cass Sunstein has famously called "group polarization."[58] By being exposed to people who share opinions and who know facts that support one side of the debate (and who do not know the facts that may support the other side), groups that deliberate together, Sunstein suggests, will tend toward the extremes of their positions.[59] Right-wing groups that deliberate together will become more right-wing; and the same will happen with left-wing groups. The structure of elections on the congressional level creates the circumstances

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[55] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 105.

[56] In some states, this also may make a difference in whether third parties get on the ballot in subsequent elections. *See, e.g.*, Green Party of Alaska v. State Div. of Elections, 147 P.3d 728, 728 (Alaska 2006) (upholding an Alaska statute which "required a group to attain at least three percent of the votes polled in the last gubernatorial election, or to register the equivalent number of voters").

[57] Note that there will be districts that are "packed" with all members of the party either because the majority party wants to have a safe margin of victory in that district, or because they are trying to put all of the other party's voters in a single district (to reduce the other party's chances of winning other districts).

[58] *See* Cass R. Sunstein, *The Law of Group Polarization*, *in* DEBATING DELIBERATIVE DEMOCRACY, *supra* note 2, at 80 [hereinafter Sunstein, *Group Polarization*]; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71 (2000) [hereinafter Sunstein, *Deliberative Trouble*].

[59] Sunstein, *Group Polarization*, *supra* note 58, at 80; Sunstein, *Deliberative Trouble*, *supra* note 58, at 71.

for deliberation not to be open, but to have it tend towards ever more close-mindedness and strident opinions. Sunstein and some of his co-authors have confirmed this hypothesis in experiments designed to mimic initially polarized debating.[60] True to the hypothesis, deliberators who were already leaning in a similar way (as citizens in partisan districts are) became more extreme in their original positions.[61]

Ackerman and Fishkin address Sunstein's worry about the pathologies of deliberation, i.e., how polarization can make deliberation a vehicle for "groupthink and issue polarization."[62] But their responses to Sunstein are flawed in a number of respects. First, they refer only to Sunstein's early studies on polarization among jurors.[63] Ackerman and Fishkin are right to notice that the contexts of jury deliberation and Deliberation Day are different, but Sunstein has since replicated his findings in contexts that more resemble what Deliberation Day would look like.[64] Second, and more importantly, they respond to Sunstein only in the case of presidential Deliberation Day, and not on congressional Deliberation Day. But for reasons I explored above, geographical boundaries are much more salient when it comes to congressional races, and the conditions in some congressional races will exactly mimic those conditions in which Sunstein finds an increasing polarization of voters. Third, even if deliberators on Deliberation Day do not have to reach a conclusion or take a side on an issue, polarization may still affect what issues get discussed in the first place and what sorts of things candidates should care about. This will create pressure towards polarization, even if it is not convergence on a single answer or position. Finally, Ackerman and Fishkin say that issue polarization and groupthink will be minimized when deliberators shift from their small groups to the large assembly and back again. But this would be true more of the presidential debates, where we can expect people from a variety of geographical backgrounds and who will not have been pre-selected for their ideological leanings. This is not the case, as we have seen, when we consider partisan districts. And indeed, the shift from

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[60] Sunstein, *Group Polarization*, *supra* note 58, at 80; Sunstein, *Deliberative Trouble*, *supra* note 58, at 71.

[61] David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?* (June 21, 2006) (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911646). *See also* Josh Chafetz, Book Note, *It's the Aggregation, Stupid!* 23 YALE L. & POL'Y REV 577, 583 n. 36 (2005) (book review) (citing the risk of polarization in the real-world context of deliberation day).

[62] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 61-65.

[63] *Id*. at 63-65.

[64] *See* Schakade, Sunstein & Hastie, *supra* note 61, at 2.

large groups (where the minority party candidate will at least have a voice) back to small groups (where it is only citizens who will be primarily from the majority party, by hypothesis) may work to counteract dissent, by snuffing it out when the citizens return to their small groups.

To be fair, Ackerman and Fishkin are aware of the problem of partisan gerrymandering, and they recommend, in an aside, "relying on a nonpartisan commission to draw district lines."[65] This, however, is in reference to the problem that many races will be non-competitive, and Deliberation Day may have to be canceled when there is no major party candidate and the third-party candidate does not poll more than twenty percent. My claim as articulated above is that there is a problem in a gerrymandered district, and not simply because of lack of competition. This is a problem with the candidates. There may also be a problem, though, with the composition of the group of citizens who deliberate, even when there are two major party candidates running. The point once more is a structural one. If we are to have robust deliberation, the composition of the group deliberating ideally should include some diversity of opinion. Unfortunately, the structure of American law gives us good reason, in the context of congressional races at least, to think that the conditions for robust deliberation will not be present.[66] Indeed, deliberation might even be counterproductive: resulting in people to shift to even more extreme positions, based on the limited information and the group pressures they confront on Deliberation Day. It suggests, indeed, that Ackerman and Fishkin's optimism about the effects of deliberation is misguided. Ackerman and Fishkin write that, "if Deliberation Day succeeded, everything else would change: the candidates, the media, the activists, the interests groups . . . ."[67] However, if deliberation occurs in a context where citizens become more extreme—such as in a successfully gerrymandered district—everything would *not* change, and polarization could become worse. All of this suggests that if we do not attend to structural problems *first* and work from the top down, rather than expect deliberation to effect changes from the bottom up, deliberation will simply not have the benefits

[65] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 105.
[66] Issacharoff & Karlan, *supra* note 54, at 541.
[67] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 3.

Ackerman and Fishkin promise.[68] In other words, there will be a trade-off between immediate deliberation and *better* deliberation.[69]

IV. RACE AND REPRESENTATION

In the previous two sections, I asked whether the structure of election law might not work against better deliberation, rather than for it. In Part I, I decided that the proposal by Ackerman and Fishkin might further entrench the two parties, by giving an advantage to them because of their pre-existing institutional advantages. The result would be that already struggling third parties would be locked out of Deliberation Day. In Part II, I suggested that the pattern of districting in America meant that deliberation among citizens in gerrymandered districts might lead to what Cass Sunstein has called "group polarization." Ackerman and Fishkin, admittedly, do recognize the problem of partisan gerrymandering in the abstract, and make recommendations about what to do about it. But the point is one of priority. Should we have citizens start deliberating, or should we first look at the structures of American election law that might limit deliberation, or cause the deliberation to be less than ideal?

In this Part, I take up a concern which is in a way orthogonal to the discussion of the previous two sections. In those sections, I took for granted that having better citizen deliberation was desirable. The question was only whether Ackerman and Fishkin's proposal seemed likely to make deliberation better, given the structure of election law, or to make it worse? Now I consider a different question: is more citizen deliberation always better? What do I mean by this question? I mean in the first instance that there may be some goals that we would want to promote that more deliberation would hinder. In this case, we would not want to maximize citizen deliberation, but to restrict it. Indeed, as I go on to suggest in this Part, there may be a trade-off in terms of *levels* of deliberation.[70] Limiting deliberation at one level may lead to the election of a representative who at another level (at the level of legislative debate, say) might make for better

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[68] The Supreme Court has so far avoided deciding that partisan gerrymandering is unconstitutional. For a comprehensive statement of the Court's refusal to intervene, see the majority opinion (authored by Justice Scalia) in *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[69] Why would we favor immediate, poorer deliberation over later, better deliberation? Perhaps we felt that deliberation (even bad deliberation) had a legitimating function, as opposed to merely being a device to produce better decisions. This would make no deliberation worse than even polarized deliberation.

[70] In Parts I and II, by contrast, the question was about trade-offs between kinds of deliberation. These included whether deliberation ought to be two-party or multiparty, as well as whether or not it ought to be polarized.

deliberation. Again, in thinking about this problem, I take my example from the structure of American election law; in this case, it involves the question of ensuring minority representation. Here, I want to propose that we do not merely have a potential question about whether deliberation as a value should trump other values, but a question about whether deliberation at another, higher level, should be preferred over better citizen deliberation.

At least since the Voting Rights Act was passed in 1964, Congress has passed measures designed to elect more minority representatives, primarily by encouraging the drawing districts that are majority minority, otherwise referred to as "safe" minority districts.[71] At one angle, this is simply a matter of rectifying a past wrong: districts had been historically drawn to *deprive* blacks of the ability to elect a candidate of their choice.[72] On this understanding of the need for majority minority districts, the point of drawing districts favorable to black candidates would in principle become otiose once it was felt that the past wrong was completely, or nearly completely, rectified. But we might consider another justification for race-conscious districting apart from the desire to right past wrongs, and give blacks an electoral voice where they have previously been deprived of one. We might think that having a diversity of voices at the legislative level is a good thing in itself, and so electing minority candidates would be good for *this* reason. This justification of race-conscious districting can be found in a recent Supreme Court affirmative action case, for instance.[73] In that case, the Court asserts that it is better that students be exposed to diverse viewpoints and positions. This goal, the Court states, can be served in part by instituting affirmative action policies. We can imagine a similar claim on the level of race-conscious districting. What is more, it is not too hard to see this argument being made in terms of increasing the *quality* of diversity at the legislative level: the more diverse the debating body, the better the quality of debate.

Bracket, for the moment, the precise merits of this argument for majority minority, or "safe" districts; one does not have to be persuaded of it to see that it might have some claim to our assent, and more importantly, to how we think about elections. What we should notice at this point is that should we agree to increasing the quality of deliberation at the legislative

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[71] For a controversial history of the Voting Rights Act and its aftermath, see ABIGAIL THERNSTROM, WHOSE VOTES COUNT? (1987).

[72] *See id*. at 11-30.

[73] *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that diversity might be considered as essential to a university's educational mission).

level (and if we think increasing minority representation would contribute to this goal), then we might have to achieve this through *limiting* debate at the citizen level, or at least potentially diminishing its quality. Better deliberation on one level may mean worse deliberation on another level. But now what we have is a tension between levels of deliberation: what might lead to better deliberation at one level (the representative level) might only be achieved by making deliberation worse at another level (the level of citizens). Importantly, the trade-off is not between deliberation and some other value (national security) but about a tension between two levels at which deliberation should occur. What level should we prefer?

To make this problem more concrete, consider the Supreme Court's pivotal decision on race districting, *Georgia v. Ashcroft*.[74] At issue in that case was Georgia's compliance with the Voting Rights Act, which as interpreted by the Court, required that certain "covered" (i.e., covered by the Voting Rights Act) states not "retrogress" when it came to minority representation, through proposals to change the districting plan of a state. The issue, in the case, was what retrogression really meant. Did it mean that the number of minority representatives in Georgia had to stay the same under the new districting plan? Or could a new districting plan allow for minority representation in other ways, such as through the creation of districts where black voters might have the potential to shift an electoral outcome, rather than control it (so-called "influence" districts)? The decision of the Court, in an opinion written by Justice Sandra Day O'Connor, ruled that Georgia's plan, although it did not necessarily keep the same number of districts that were certain to elect black candidates, was permissible.[75] Why? It was a legitimate move, she said, if a state wanted to try a districting plan that would try to preserve minority representation by creating "coalition" or "influence" districts, as opposed to maintaining districts which guaranteed that black candidates were elected.[76] Citing Hannah Pitkin, Justice O'Connor argued that "descriptive representation" was not the only kind of representation we should try to secure; we should also treat favorably plans that would help "substantive representation" as well.[77] The strategy evinced by the Georgia plan, O'Connor wrote, "has the potential to increase 'substantive representation'

[74] Georgia v. Ashcroft, 539 U.S. 461 (2003).
[75] *Id*.
[76] *Id*. at 477.
[77] *Id*. at 481.

in more districts by creating coalitions of voters who will together help to achieve the electoral aspirations of the minority group."[78]

Note the language of Justice O'Connor's opinion: one point she makes in favor of the Georgia plan is that enables coalitions of voters to work together to endorse a shared candidate. From this language, we might be able to see her opinion as one which Ackerman and Fishkin would approve of. By creating "influence" districts where black voters may influence the vote but not determine it, citizens will be forced to deliberate with one another and to create coalitions across racial lines in order to elect a candidate that will represent both of their sets of interests.[79] Citizen deliberation, on this plan, we can surmise, would be increased. But the tradeoff to this is that a candidate might be elected who does not adequately represent minority interests. The result of having to bargain and deliberate with other citizens may mean that the minority preferred candidate might lose (as O'Connor acknowledges[80]). This might mean that minority interests are not fully represented at the congressional level. It might also meant that deliberation at the congressional level might well be poorer: a candidate who represents a coalition of interests may have less of a defined viewpoint than a candidate who is elected from a majority minority district, and who has the freedom, perhaps, to take positions that would not otherwise be represented in Congress.

So here we have a potential tradeoff *within* the value of deliberation, as opposed to trade-offs in the kind or quality of deliberation. Which level of deliberation should we prefer? Should we limit some citizen deliberation—such as the coalition building that might result from the creation of influence districts—in order to make possible better and more diverse deliberation at another level? To be sure, much of the above argument depends on premises that are controversial, e.g., that coalitions could not recognize that minority candidates might be a good thing, and that representatives from safe minority districts will necessarily bring a diverse viewpoint from Congress. But the point is larger than the particular example. The point is the structural one about levels of deliberation, which we have to consider so long as we are not merely talking about *direct* democracy, but about *representative* democracy.[81] Once we have another

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[78] *Id.*

[79] In the words of another opinion, diverse groups would have to "pull, haul, and trade to find common political ground." Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

[80] *Ashcroft*, 539 U.S. at 481.

[81] On the relation of direct and representative democracy, see Michael Neblo, *Thinking Through Democracy*, 3 ACTA POLITICA 177-79 (2005).

level, we inevitably have to consider the relationship between the two levels, and this problem will emerge in many different contexts. Indeed, we might have even considered the question in terms of partisan gerrymandered districts. Is it better to have voters become more extreme, so that those candidates with more extreme viewpoints will be elected to Congress? I did not consider this issue in the context of partisan gerrymandered districts, because I assumed (perhaps mistakenly) that an excess of partisanship in representative deliberations might be a vice, where with minority districts, it is an open question whether we might want to increase the number of blacks and Latinos in Congress, not merely for the sake of remedying past exclusion, but for the sake of deliberation that takes the interests of many different sorts of constituents into account.

V. CONCLUSION

In closing, I want to put my criticisms of Ackerman and Fishkin's proposal in some context, to make clear the aim of those criticisms, and their limits. I have four points to make. First, my criticisms are surely not made in the spirit of undermining the whole idea of Deliberation Day. Indeed, I think something *like* Deliberation Day is very promising and my criticisms could be read in a way to suggest emendations to Ackerman and Fishkin's idea. For example, I suggested that third parties might be able to supply some of the issues that the deliberators on Deliberation Day undertake to discuss, even if the third-party candidate does not poll the required fifteen percent. More deeply, I wondered whether third-party candidates might be invited to the debate, even if they have not reached fifteen percent in the polls. This might serve the interests of deliberation by exposing the deliberators to more points of view,[82] and thus is a reform made in the spirit of improving the deliberation that occurs during Deliberation Day. It is not a suggestion that we should do away with Deliberation Day, or that Deliberation Day is an inherently flawed idea.

With partisan gerrymandering, Ackerman and Fishkin agree that this problem needs to be addressed; my only emendation to their proposal was that failure to address this problem *first* might result in deliberation being less productive and more skewed than it otherwise might be. Far from a deep disagreement between Ackerman and Fishkin and myself, this is a comparatively minor squabble about priorities. As for the problem of race

[82] In fact, I would favor inviting the third-party candidate to the debate, even if the other parts of Deliberation Day were kept the same.

and elections, this is a deep one, and it is no fault of Deliberation Day that it does not solve it. Perhaps one simply has to make a choice between robust citizen deliberation and diversity of representation. Or perhaps one could find a solution that would be able to reconcile these two levels of deliberation. All of this is to say that none of the three major points above are addressed globally, at the very idea of a Deliberation Day. These points instead are meant to show that if Deliberation Day does not recognize and address the structure of American election law, its aims and its purposes might be frustrated. And this is an argument that is done in the spirit of those aims and purposes.

Ackerman and Fishkin may disagree with the direction these proposals could take us. This takes me to the second point I want to emphasize. Ackerman and Fishkin may feel that it is better to have deep and robust two party debates, because offering voters two clearly defined choices is better than having a cacophony of many voices in a discussion. They might prefer even polarized discussion on Congress Day to no debate at all. And they might reject the idea that it is better to limit citizen debate in order to have more diverse debate at the level of representatives. All of these options are perfectly defensible. The problem is that Ackerman and Fishkin fail to give them the defense that they need. When Ackerman and Fishkin make a proposal that opts for one of these conceptions of debate, they are pushing other options off the table. In the words of my title: they are opting for one horn of several dilemmas that exist between kinds and levels of deliberation. In the same way, the present structure of American election law makes trade-offs, by entrenching two party candidates, by allowing partisan gerrymanders, and constructing minority "safe" districts. This system is again defensible, but it needs a defense, in terms of the two party system, in terms of the good of diverse debate, etc. I have intimated throughout this paper that perhaps a defense of the system can be made in terms of a certain ideal of deliberation.[83] But, as I have also stressed, that ideal of deliberation is not the only one out there.

My third clarification may already be implicit in what I have said, but it is important to bring out. Recently, there have been many critics of the good of deliberation itself.[84] It is hopelessly misguided, it is argued, to think that deliberation between citizens can ever really be productive. For

[83] At least, this is the suggestion. Perhaps American election law should not be directed towards any one ideal, but rather it may instantiate a number of conflicting ideals: free expression, equality, association, etc.

[84] The most influential has probably been Sunstein. *See* Schkade, Sunstein & Hastie, *supra* note 61. But Sunstein offers his criticisms in a spirit friendly to deliberation.

example, in a recent book, Guido Pincione and Fernando Tesón argue that "political deliberation does not serve cognitive goals, and it often drives us further from the truth."[85] I do not share the pessimism of these authors. Or rather, I do not share their pessimism about the *possibilities* of democratic deliberation. Ackerman and Fishkin make a powerful case that our current state of deliberation is very poor; but this does not mean that it cannot change. The problem, Ackerman and Fishkin claim, is one of how politics is currently organized, and not about the intrinsic possibilities or limitations of deliberative rationality. Politics is not currently organized around rational persuasion, but rather around sound bites. By proposing Deliberation Day, Ackerman and Fishkin aim to make giving arguments the center of campaigns: it puts a premium on articulating positions that will stand the test of questioning and discussion. Again, my argument in this paper can be seen in the service of this larger project. My claim has been that if we do not recognize certain existing structural impediments to better deliberation, or trade-offs we might be forced to make between kinds of deliberation, we might end up increasing rather than reducing certain pathologies of deliberation. The barriers to effective deliberation are deep, a fact no one need deny. The appeal of Ackerman and Fishkin's project is that it recognizes the extent we may have to go to remove those barriers. My essay has merely pointed to a few additional barriers we will need to overcome.

But how to overcome those barriers? Here I reach my final point of clarification, and it may represent a real point of difference between my approach and the approach that Ackerman and Fishkin take. As I have stated repeatedly throughout my paper, Ackerman and Fishkin have a faith that if we unleash citizen deliberation, then reform will emerge, from the bottom up. They say, as I have quoted them, "If Deliberation Day succeeded, everything else would change: the candidates, the media, the activists, the interests groups, the spin doctors . . . ."[86] The idea is not outlandish, even if it is a little optimistic. If there were a Deliberation Day, many incentives would change. But it is wrong to think that citizen deliberation, by itself, can make these changes. Indeed, if the electoral structures I have pointed to are not changed first, then deliberation may well be counterproductive. It will not be as wide-ranging as we might have hoped, with the result that the two major parities become more entrenched,

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[85] GUIDO PINCIONE & FERNANDO R. TESÓN, RATIONAL CHOICE AND DEMOCRATIC DELIBERATION viii (2006).

[86] Ackerman & Fishkin, DELIBERATION DAY, *supra* note 15, at 3.

and debate as result will become more impoverished (at best) or polarized (at worst). So in many cases we will have to start from the top down. And this is where I return to my major theme, which is that deliberative democratic theory will need to pay attention to election law if its proposals are to be realistic and effective. For it is precisely election law and at the limit the Constitution that dictates the larger electoral structure that I have been describing. As the Supreme Court conducts further "constitutionalization of democratic politics,"[87] the structure of election law increasingly becomes inscribed into the structure of the Constitution itself. Is the Constitution silent about partisan gerrymanders? About the rights of third parties? Insofar as more deliberation will make a difference here, it will not be the deliberation of ordinary citizens in assemblies first and foremost, but the deliberations a different body, arguably more august but still potentially partisan—the Supreme Court.

[87] Pildes, *supra* note 8, at 154.